

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
18 EDC 03019

<p>█ together with his parent █ Petitioner,</p> <p>v.</p> <p>Charlotte-Mecklenburg Schools Board of Education Respondent.</p>	<p><b>FINAL DECISION</b></p>
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THIS MATTER CAME on to be heard before Administrative Law Judge Selina Malherbe on September 24, November 20 and 26-30, December 12-14, 2018, and January 4, 2019.

**APPEARANCES**

For the Petitioner:

Ann Paradis and Corey Frost<sup>1</sup>  
Gahagan Paradis, PLLC  
3326 Durham-Chapel Hill Boulevard, Suite 210-C  
Durham, NC 27707

For the Respondent:

Jill Sanchez-Myers and J. Melissa Woods  
Charlotte-Mecklenburg Board of Education  
600 East Fourth Street, 5th Floor  
Charlotte, NC 28202

**WITNESSES**

For Petitioner:

Petitioner █ Student  
Petitioner █ Mother of █  
█ former Charlotte-Mecklenburg Schools (hereafter "CMS") Teacher and  
s former Private Math Tutor  
█ Head of School, █ (hereafter "█ █"  
█ Director of Academic Standards, █ s Teacher, █ █  
Dr. █ Expert Witness, Behavior Analyst, Professor of Special Education  
Dr. █ Expert Witness, Neuropsychologist

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<sup>1</sup> █ also appeared in this case for Petitioner but withdrew prior to the conclusion of the proceedings.

For Respondent:

█ is former English Teacher, CMS  
█ is former Earth Science Teacher, CMS  
█ Expert Witness, School Psychology Specialist, CMS  
█ Exceptional Children's Itinerant Coordinating Teacher, CMS  
Stacie Levi, Director of Administrative Services, Exceptional Children's Department, CMS

### **PREHEARING MOTIONS**

Various motions were made prior to and during the hearing and rulings were made on the record. Of particular note for this written decision: Respondent's Motion for Partial Summary Judgment was granted concerning all claims arising prior to May 17, 2017, raised in Petitioner's Second, Fourth and Seventh Counts.

### **EXHIBITS**

The following Exhibits were admitted into evidence:

Stipulated Exhibits ("Stip. Ex.") 1 through 4, 6-7, 9, 12-14, 17, 19-20, 36 (for limited purpose: historical background), 37 (for limited purpose: historical background), 38 (pp. 215, 217-232), 39 (for limited purpose: historical background), 43, 45-47, 49-50, 51 (for limited purpose: it was discussed at 5/19/17 meeting), 52 (pp. 312-318), 54-56, 66, 70, 73, 77 (pp. 485-486), 80, 87, 90-94, 97 (pp. 805-806), 99 through 101; and

Petitioner's Exhibits ("Pet'r's Ex.") 6 (pp. 20, 22, 23 (only and for limited purpose: historical background), 14, 18 (█ email only), 19, 21 (for limited purpose: it was discussed at 5/19/17 meeting, but not for the truth of the contents), 22, 23, 25 (for limited purpose: showing parent's request for the IEP meeting), 28 (limited to only emails to/from █ pp. 312-313), 29, 31-33, 36, 37 (p. 392, 394-395), 38 (limited to █ emails only, pp. 430-431), 39 (limited to █s and █ emails only, pp. 436, 452 (█ email only) 478-479, 484 limited to email from Ms. █ 496 limited to 01/18/2017 email from Ms. █ 40 (p. 521-522, 525-526), 41 (p. 562, 575, 578-579), 43 (limited to █s emails only, pp. 689-690), 44-48, 57-60, 61 (limited to █ text), 62 -66, 68-70.

The following exhibits were admitted only pursuant to Petitioner's offer of proof but were not accepted as evidence: Stipulated Exhibits 22, 24, 29 (pp. 135-136), 57.

### **TRANSCRIPT**

Transcript volumes 1 through 9 were received and have been retained in the official record of this case. Transcript volumes 3 and 4 were corrected by the court reporter. The Parties filed a Stipulation on April 1, 2019, stating that they do not object to the amendments made to Transcript volumes 3 and 4, and that in Transcript volume 8 at line 23, the word "combination" is "accommodations".

Transcript volumes 1 through 9 correspond to the following days of hearing:

- a. Transcript volume 1 – November 20, 2018
- b. Transcript volume 2 – November 26, 2018
- c. Transcript volume 3 – November 27, 2018 (revised)
- d. Transcript volume 4 – November 28, 2018 (revised)
- e. Transcript volume 5 – November 29, 2018
- f. Transcript volume 6 – November 30, 2018
- g. Transcript volume 7 – December 13, 2018
- h. Transcript volume 8 – December 14, 2018
- i. Transcript volume 9 – January 4, 2019

### **ISSUES**

1. Whether Respondent failed to conduct a full and individualized evaluation of [REDACTED] between May 17, 2017 and May 17, 2018, and if so, whether any such failure denied [REDACTED] an opportunity for a free appropriate public education (“FAPE”);
2. Whether Respondent failed to provide Petitioners an opportunity to examine [REDACTED]’s records, and if so, whether any such failure denied Petitioners their right to parent participation;
3. Whether Respondent failed to ensure Petitioners’ attendance at the May 19, 2017 IEP meeting, and if so, whether any such failure denied Petitioners their right to parent participation;
4. Whether Respondent inappropriately denied [REDACTED] eligibility for special education services on May 19, 2017, and if so, whether any such failure denied [REDACTED] a FAPE;
5. Whether Respondent predetermined [REDACTED]’s eligibility without consideration of the information available;
6. Whether Respondent failed to develop and offer an appropriate Individualized Education Plan (“IEP”) between May 17, 2017 and May 17, 2018, and if so, whether any such failure denied [REDACTED] a FAPE;
7. If Respondent did deny [REDACTED] a FAPE, whether [REDACTED] is a placement reasonably calculated to provide educational benefit for [REDACTED] that supports an award of tuition reimbursement; and
8. If Respondent did deny [REDACTED] a FAPE, whether an award of compensatory education is appropriate.

### **BACKGROUND**

At the start of the hearing in this matter, the parties agreed to Jurisdictional, Party, Legal, and Factual Stipulations in a proposed Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings on September 24, 2018. Stipulations are referenced as “Stip. 1,” “Stip.

2,” “Stip. 3,” etc. To the extent that the Stipulations are not specifically stated herein, the Stipulations of Fact in the Order on the Pre-Trial Conference are incorporated fully herein by reference. The parties stipulated to, and the Undersigned hereby adopts, the following:

### **Jurisdiction, Parties and Applicable Law**

1. [REDACTED] and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.
2. As the party seeking relief, the burden of proof for this action lies with Petitioner. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
3. Petitioner has the burden of proof by the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).
4. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 et seq., and implementing regulations 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. 115C-109.6(a) and (b) control the issues to be reviewed.
5. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under the IDEA are codified at 34 C.F.R. Parts 300 and 301.
6. Respondent is a local education agency receiving monies pursuant to the IDEA.
7. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9 and the corresponding state regulations, including the *Policies Governing Services for Children with Disabilities*.
8. Petitioner, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
9. Petitioner is seeking compensatory education for his claims.
10. Petitioner is seeking private school reimbursement for the 2017-2018 and 2018-2019 academic years in which [REDACTED] was enrolled at [REDACTED].
11. Each of the exhibits identified by the parties as “Stipulated Exhibits” were stipulated as genuine and no objections were to be made to their authenticity.

### **Stipulated Facts**

12. [REDACTED] is an 18-year-old student residing in [REDACTED] County. [REDACTED] is the parent of [REDACTED] and their address is [home address is omitted].
13. [REDACTED]’s date of birth [REDACTED].

14. Charlotte-Mecklenburg Board of Education (“CMS”), is a local educational agency and is required to comply with the Individuals with Disabilities Education Act of 2004 (“IDEA”).
15. [REDACTED] attended [REDACTED] High School (“[REDACTED]” a public high school operated by Respondent, during the 2016-2017 academic year.
16. [REDACTED] registered [REDACTED] for school in CMS on June [REDACTED], 2016 and [REDACTED] enrolled at [REDACTED] on August [REDACTED], 2016.
17. [REDACTED]’s academic schedule for the 201[REDACTED]-201[REDACTED] academic year included the following courses: NC Math 3, Principles of Business & Finance, English III, Wind Ensemble (Advanced), American History I, Latin I, American History Founding Principles: Civics & Economics, and Earth/Environmental Science.
18. During the 2016-2017 school year, [REDACTED] participated in [REDACTED], which is an extra-curricular activity for which students can elect to receive course credit.
19. [REDACTED] was a School Psychologist employed by Respondent, who conducted [REDACTED]’s psychological evaluation in May 2017.
20. [REDACTED] is a Speech and Language Pathologist employed by Respondent, who conducted [REDACTED]’s hearing screening and speech language pathology evaluation in March 2017.
21. [REDACTED] is an Occupational Therapist employed by Respondent, who conducted [REDACTED]’s occupational therapy evaluation in March 2017.
22. [REDACTED] is a Registered Nurse who conducted [REDACTED]’s vision screening in March 2017.
23. Dr. [REDACTED] conducted an intellectual evaluation of [REDACTED] on March 28, 2014, finding [REDACTED]’s intellectual abilities within the average range. Dr. [REDACTED] offered the opinion that [REDACTED]’s true learning capacity is likely closer to 110 (75th percentile) than 100.
24. Dr. [REDACTED] evaluated [REDACTED] on February 4, 2016. He diagnosed [REDACTED] as follows:
- 300.00 (F41.9) Anxiety Disorder characterized by low stress response threshold
  - 314.00 (F90.9) Unspecified Attention Deficit/Hyperactivity Disorder (ADHD), Mild
  - 315.00 (F81.0) Specific Learning Disorder with impairment in reading (dyslexia), Mild, reading rate/fluency
  - 315.2. (F81.81) Specific Learning Disorder with impairment in written expression (dysgraphia), Mild, spelling accuracy, grammar and punctuation accuracy
25. On May 19, 2017, the IEP team determined that [REDACTED] did not meet the eligibility criteria for Other Health Impairment, Autism, and Specific Learning Disability.

26. CMS emailed the IEP documents and evaluations from the May 19, 2017, IEP meeting to [REDACTED] on May 19, 2017.
27. During the 201[REDACTED]-201[REDACTED] school year, [REDACTED] did not earn credits for NC Math 3, Latin I, and Principles of Business & Finance.
28. On June 20, 201[REDACTED], [REDACTED] received [REDACTED]'s CMS psychological report via email from [REDACTED].
29. From June to August 201[REDACTED], [REDACTED] completed a summer school geometry course through [REDACTED] paid for Ms. [REDACTED] a certified math teacher, to instruct [REDACTED].
30. Petitioner [REDACTED] enrolled in [REDACTED] [REDACTED] (sic) for the 2017-2018 school year.
31. Petitioner [REDACTED] is currently attending [REDACTED] [REDACTED] (sic) for the 2018-2019 school year.

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

### **FINDINGS OF FACT**

#### **Background**

1. The Petition for Contested Case Hearing ("Pet.") was filed on May 17, 2018. (Pet.). The relevant time period for any alleged violations is May 17, 2017 to May 17, 2018.
2. The Petition was filed when [REDACTED] was eighteen (18) years old. (Pet.).
3. For the 2016-2017 school year, [REDACTED] enrolled [REDACTED] in Respondent's district for his eleventh-grade year where he attended [REDACTED] High School ("[REDACTED]") which served approximately [REDACTED] students in grades 9-12. (Test. of [REDACTED] Stips. 15 & 16.)
4. Initially at [REDACTED] [REDACTED] faced acclimation challenges as [REDACTED] was a significantly larger school than any school he had attended and the classes were more fast-paced. (Test. of [REDACTED] [REDACTED] eventually made friends and became more comfortable at [REDACTED] (Test. of [REDACTED])

Although [REDACTED] understood his classwork and assignments, he did not consistently turn in his homework assignments. (Test. of [REDACTED] and [REDACTED] Stip. Ex. 97) After [REDACTED] got home from school or marching band, he had online tutoring six times per week. (Test. of [REDACTED] and [REDACTED] [REDACTED] still had an average of four hours of academic homework a day. (Test. of [REDACTED]

5. During the fall semester of the 2016-2017 school year, [REDACTED] had numerous time commitments outside of school that consumed more than 25 hours per week. (Test. of [REDACTED] and [REDACTED] In addition to his required academic coursework, [REDACTED] took a voluntary marching band class for which he chose to receive a grade/credit. (Test. of [REDACTED] and [REDACTED] Stip. 18). Marching band required 8-10 hours per week of band practice, performances at football games, and weekend band competitions, which sometimes required 12 hours away from home. (Test. of [REDACTED] and [REDACTED] The season ended on November 4, 2016. In addition, [REDACTED] had private music lessons and he practiced his instrument at home on a daily basis. (Test. of [REDACTED] and [REDACTED]

6. During the second semester of the 201[REDACTED]-201[REDACTED] year, [REDACTED] participated in extra-curricular activities such as Jazz band and [REDACTED] Honor band, had weekly private music lessons, and practiced his instrument at home on a daily basis. (Test. of [REDACTED] and [REDACTED]

7. When [REDACTED] began struggling with his academic courses, both [REDACTED] and [REDACTED] refused to decrease [REDACTED]'s extra-curricular activities. (Test. of [REDACTED] and [REDACTED] On more than one occasion, [REDACTED] either left after-school tutoring early or did not go to after-school tutoring in order to participate in his extra-curricular activity. (Test. of [REDACTED] [REDACTED] and [REDACTED]

8. On September 7, 2016, one week after school began, an IEP team convened at [REDACTED]'s request. (Test. of [REDACTED] Stip. Ex. 17) IEP Teams also convened on September 28, 2016 and January 18, 2017 to complete a Special Education Referral for an evaluation for Exceptional Children's ("EC") Services for [REDACTED] (*Id.*). According to [REDACTED], [REDACTED] has always straddled the line between special education and general education. (Test. of [REDACTED] [REDACTED] attended each of those meetings and made her concerns for [REDACTED] known and expressed her desire that [REDACTED] have an Individualized Education Plan ("IEP"), specifically requesting the Learning Lab class. (Test. of [REDACTED] [REDACTED] and [REDACTED] At those IEP meetings, the IEP team reviewed [REDACTED]'s grades, his abilities, his needs, and considered teacher and parent input. (Stip. Exs. 19, 36 & 99; Test. of [REDACTED] [REDACTED] While the IEP team determined that [REDACTED] would not be evaluated for special education services, [REDACTED] was provided a Section 504 plan and accommodations. (Stip. Exs. 17, 37, 51 & 101).

9. [REDACTED] was in frequent email communication with the [REDACTED] teachers and staff about her concerns, her viewpoint, and her continued desire that [REDACTED] be provided an IEP. (Test. of [REDACTED] and [REDACTED] Pet'r's Exs.6, 18 & 34).

10. Respondent's staff addressed [REDACTED]'s concerns by implementing behavioral supports, strategies, and interventions for [REDACTED] (Test. of [REDACTED] and [REDACTED] Stip. Exs. 36, 46 & 56)

11. [REDACTED] was provided the accommodation of extra time to turn in his homework. (Stip. Ex. 51; Test. of [REDACTED] [REDACTED] rarely used the accommodation and consistently did not turn in homework assignments. (Test. of [REDACTED] [REDACTED] and [REDACTED]
12. [REDACTED] was provided the accommodation of extra time to take assessments, but he rarely used this accommodation. (Stip. Ex. 51; Test. of [REDACTED]
13. [REDACTED] was provided opportunities to improve his grade on low-scoring assignments by submitting completed test corrections which would have raised his scores. He did not take advantage of those opportunities. (Test. of [REDACTED] [REDACTED] and [REDACTED]
14. Each of [REDACTED]'s teachers at [REDACTED] offered before/after school tutoring hours. (Test. of [REDACTED] [REDACTED] and [REDACTED] [REDACTED] did not take advantage of those opportunities despite the repeated recommendations of the IEP team and his teachers that [REDACTED] attend the tutoring offered at [REDACTED] (Stip. Exs. 37 & 46; Test. of [REDACTED] [REDACTED] and [REDACTED] [REDACTED] attended tutoring for English approximately four times during the school year and did not attend any tutoring for Earth/Environmental Science during the spring semester. (Test. of [REDACTED] and [REDACTED]
15. The IEP team also provided [REDACTED] with suggestions and strategies to help him with homework completion and submission. (Test. of [REDACTED]
16. On March 15, 2017, Respondent convened an IEP meeting to conduct a Special Education Referral for an evaluation for Exceptional Children's ("EC") Services for [REDACTED] (Stip. Ex. 46). [REDACTED] attended this meeting. (Stip. Ex. 45; Test. of [REDACTED]
17. At the meeting, the team documented the "Reasons for Referral/Areas of Concern," which determined what evaluations would be conducted. (Test. of [REDACTED] and [REDACTED] [REDACTED] The concerns indicated by the team included the areas of Language Arts, Mathematics, Health/Medical, Motor skills, and Study/Work skills. (Stip. Ex. 46).
18. The IEP team determined that evaluations of [REDACTED] were needed in the following areas: behavioral/emotional, social developmental history, speech/language, adaptive behavior, vision screening, hearing screening, observation, and occupational therapy. (Stip. Ex. 46).
19. The IEP team, including [REDACTED] agreed that the Psychological, Educational, and Autism evaluations conducted by Dr. [REDACTED] the prior year were "current and relevant". (Stip. Ex. 45; Test. of [REDACTED]
20. In the eligibility category of Autism, Respondent conducted all required assessments according to the North Carolina *Policies Governing Services for Children with Disabilities* and used a variety of assessment tools and strategies. (Test. of [REDACTED] and [REDACTED] Stip. Ex. 66). The IEP team's decision not to conduct an Autism evaluation is supported by the evidence:



a. The IEP team, including [REDACTED] noted in the “Reasons for Referral/Areas of Concern” any concerns in the areas of communication, sensory, social interactions, or behavior other than [REDACTED] under-estimating himself and noted strengths in communication skills and behavioral social skills. (Stip. Ex. 46). The lack of concerns in those areas is consistent with the testimony of [REDACTED]’s teachers at [REDACTED] and the record. (Test. of [REDACTED] and [REDACTED] Stip. Exs. 46, 66 & 80). Neither the Speech/Language evaluation nor the Occupational Therapy evaluation conducted by Respondent indicated any concerns regarding [REDACTED]’s communication skills, social interactions, sensory responses or indicated an autism evaluation should be conducted. (Test. of [REDACTED] Stip. Exs. 50 & 55).

b. At the time of the referral meeting, [REDACTED] had not had a diagnosis of Autism Spectrum Disorder (“ASD” or “Autism”) since 2012. (Stip. Ex. 1). Although [REDACTED] was diagnosed with Autism in preschool in 2005 (Test. of [REDACTED] Dr. [REDACTED] [REDACTED] evaluated [REDACTED] every year from 2012 through 2016, including two Autism evaluations, and never diagnosed [REDACTED] with Autism. (Stip. Exs. 1, 2, 4 & 12). In 2012, Dr. [REDACTED] determined that [REDACTED] no longer met the diagnostic criteria for Autism. (Stip. Ex. 1). On February 4, 2016, Dr. [REDACTED] conducted another Autism evaluation of [REDACTED] specifically the Autism Spectrum Rating Scales (“ASRS”). (Stip. Ex. 12). Dr. [REDACTED] February 2016 evaluation noted that [REDACTED]’s parents endorsed no significant symptoms of Autism, and that [REDACTED]’s symptoms of Autism continued to decrease over time. (*Id.*).

c. In September 2016, [REDACTED] informed [REDACTED]’s teachers at [REDACTED] in an email that [REDACTED] did not have a diagnosis of Autism and “no longer has the quirky mannerisms or social difficulties of Autism.” (Pet’r’s Ex. 37, p. 390; Test. of [REDACTED] and [REDACTED]

d. There was no reason to suggest to the IEP team that an additional Autism evaluation was needed. (Test. of [REDACTED] and [REDACTED] The IEP team’s decision to use Dr. [REDACTED] 2016 evaluation was in the discretion of the IEP team and was not inappropriate. (Test. of Dr. [REDACTED] [REDACTED] and [REDACTED]

e. [REDACTED] “stood by” Dr. [REDACTED] 2016 evaluation and thought it was accurate when it was conducted. (Test. of [REDACTED] and Dr. [REDACTED]

21. In the category of Other Health Impairment (“OHI”), the IEP team conducted all required assessments and used a variety of assessment tools and strategies, including research-based interventions. (Test. of [REDACTED] and [REDACTED] Stip. Ex. 70). The research-based interventions included check in/check out with [REDACTED]’s band teacher and the use of an agenda to help [REDACTED] self-monitor his assignments and due dates. (Stip. Exs. 46 & 70; Test. of [REDACTED] [REDACTED] and [REDACTED]

22. The IEP Team did not conduct a Functional Behavior Assessment (“FBA”) which is not required under any category of eligibility. (Test. of [REDACTED]

23. Petitioner’s witness, Dr. [REDACTED] testified that an FBA could be helpful and that she was unclear whether the IDEA required an FBA for any situation other than disciplinary placement.

(Test. of Dr. [REDACTED] According to Petitioner's witness, Dr. [REDACTED] whether to conduct an FBA is in the IEP team's discretion. (Test. of Dr. [REDACTED])

24. Respondent used a variety of assessment tools and strategies to gather information relevant to determining whether [REDACTED] was eligible for special education services. The data collected by the IEP team was sufficient to inform the team's decision in determining [REDACTED]'s eligibility. (Test. of [REDACTED] and [REDACTED])

25. Based on the above findings, the Undersigned finds that Respondent conducted a full and individualized evaluation of [REDACTED] and assessed all areas of suspected disabilities for [REDACTED]

#### **May 19, 2017, Eligibility Determination Meeting**

26. On May 19, 2017, Respondent convened an IEP team meeting to determine whether [REDACTED] was eligible for special education services. (Stip. Ex. 73). The IEP team met for approximately five and a half hours. (Test. of [REDACTED] and [REDACTED])

27. Prior to this meeting, Petitioner was given a Prior Written Notice which contained summaries of [REDACTED]'s evaluation results for Autism and Other Health Impairment categories. (Stip. Exs. 63 & 70). Petitioner was not provided with the actual evaluation reports prior to the IEP meeting because it is Respondent's practice not to provide evaluation reports to parent(s) in advance of an IEP meeting; the full evaluation reports are explained during the IEP meeting. (Test. of [REDACTED] and [REDACTED])

28. In determining eligibility, the IEP team gathered relevant functional, developmental, and academic information about [REDACTED] and drew upon information from a variety of sources, including tests, parent input, teacher recommendations, psychological evaluation, and information about the child's physical condition, social background, and adaptive behaviors. (Stip. Exs. 66, 70, 73 & 80; Test. of [REDACTED] and [REDACTED])

29. The IEP team specifically considered the following: social history, educational evaluation (Woodcock-Johnson IV), medical evaluation, psychological evaluation (Wechsler Intelligence Scale for Children-V), Wide Range Assessment of Visual Motor Abilities (WRAVMA), Speech/Language screenings and evaluations, behavior assessments (BASC-3: self, parent, and teacher ratings), adaptive behavior assessments (ABAS-3: parent and teacher ratings), Autism Spectrum Rating Scale (ASRS: parent and teacher ratings), vision and hearing screenings, student observations, research based interventions, review of existing data, PowerSchool reports and grades, homework and class work, behavior plan, and Section 504 plan. (Stip. Exs. 66, 70, 73, 77 & 80; Test. of [REDACTED] and [REDACTED]) The team also considered input from all of [REDACTED]'s teachers. (Test. of [REDACTED] and [REDACTED])

30. The IEP team reviewed data provided by [REDACTED] including rating scales, social/developmental history, and previous evaluations that the IEP team determined current and relevant at the referral meeting on March 15, 2017. (Stip. Exs. 66, 70 & 73; Test. of [REDACTED])

31. In the category of Autism (AU), the IEP team determined that the data did not show an impairment in the area of Social Communication. (Stip. Exs. 12, 46, 50, 66 & 80). The ratings of the respondents yielded scores of “No Problem Indicated” or “Slightly Elevated.” (Stip. Ex. 12; Test. of [REDACTED])

32. The results of [REDACTED]’s general behavior rating scales indicated that [REDACTED]’s functional communication was within the average range or at-risk when compared to same-age peers. (Stip. Exs. 66 & 80; Test. of [REDACTED]) The results of the speech/language assessment indicate that [REDACTED]’s receptive/expressive language skills and pragmatic language skills are within the average range. (Stip. Ex. 50). The language samples and communication survey indicated that [REDACTED]’s overall communication skills are age-appropriate. (*Id.*) No concerns were noted by the IEP team, including the parent, regarding communication at the March 15, 2017 initial referral meeting (Stip. Ex. 46) or during the student observations of May 11 or 12, 2017. (Stip. Ex. 66).

33. In the category of Autism, the IEP team determined that the data did not show an impairment in the area of Social Interaction. (Stip. Exs. 12, 46, 50, 66 & 80). On the Autism Spectrum Rating Scale, [REDACTED]’s raters indicated “No Problem Indicated” or “Slightly Elevated” in the areas relevant to social interaction (Stip. Ex. 12; Test. of [REDACTED]) The results of [REDACTED]’s general behavior rating scales indicated that [REDACTED]’s social skills were within the average range when compared to same-age peers. (*Id.*; Stip. Ex. 80; Test. of [REDACTED]) The results of [REDACTED]’s adaptive behavior rating scales indicated that [REDACTED]’s social skills fell within the average to low average range when compared to same-age peers. (*Id.*) No concerns were noted by the IEP team, including the parent, regarding social interaction at the March 15, 2017, initial referral meeting (Stip. Ex. 46) or during the student observations of May 11 or 12, 2017. (Stip. Ex. 66).

34. In the category of Autism, the IEP team determined that the data did not show an impairment in the area of Sensory Responses. (Stip. Exs. 12, 46, 55 & 66). [REDACTED] had average scores in the category of Sensory Sensitivity on the Autism Spectrum Rating Scale; each rater’s score resulted in “No Problem Indicated.” (Stip. Ex. 12). The IEP team, including [REDACTED] noted no concerns regarding sensory responses at the March 15, 2017, initial referral meeting. (Stip. Ex. 46).

35. [REDACTED] did not meet three of the four criteria for impairment in the category of Autism. Overall, [REDACTED]’s evaluation scores did not fall in the significant range, and the data did not indicate that [REDACTED]’s communication, social interaction, or sensory responses were issues in the educational environment. While an elevated subscore can indicate a potential concern, it does not determine an impairment when considered together with all of the data. Ms. [REDACTED] did not observe significant differences across raters’ responses. (Test. of [REDACTED])

36. Under the category of Autism, the IEP team determined that [REDACTED] did not demonstrate an impairment in three of the four areas under the eligibility category of Autism. (Stip. Ex. 66) The data the IEP team had available was consistent with the determination of no impairment in Communication, Social Interaction, or Sensory Responses under the category of Autism. (*Id.*)

37. The IEP Team determined [REDACTED] had an impairment in the area of restrictive, repetitive, stereotypic patterns of behavior, interests, and/or activities. (Test. [REDACTED] and [REDACTED])

38. At [REDACTED] [REDACTED] often participated in class. (Test. of [REDACTED] [REDACTED] and [REDACTED] [REDACTED] raised his hand to volunteer, asked questions in class, and answered questions that the teacher asked the class. (Test. of [REDACTED] and [REDACTED] Sometimes, [REDACTED] was the only student to answer questions in class. (Test. of [REDACTED] In group discussions, [REDACTED] spoke up and offered his ideas and was not afraid to express a different viewpoint from his classmates. (Test. of [REDACTED] [REDACTED] talked to both teachers about things outside of the class's subject matter and initiated conversations with them. (Test. of [REDACTED] and [REDACTED] [REDACTED] "was definitely not shy." (Test. of [REDACTED] [REDACTED] had a great sense of humor and grasp of sarcasm. (Test. of [REDACTED] [REDACTED] had friends and participated in outside social activities. (Test. of [REDACTED])

39. The IEP team's determination that the data did not show an impairment in the areas of communication, social interaction, or sensory responses is consistent with the testimony of [REDACTED]'s teachers at [REDACTED] [REDACTED]'s testimony, and is supported by the record. (Test. of [REDACTED] [REDACTED] and [REDACTED] Stip. Exs. 12, 50, 66 & 80).

40. [REDACTED]'s subsequent clinical diagnosis of Autism Spectrum Disorder on September 11, 2017, by a private clinician is different from Autism eligibility under the IDEA. (Test. of Dr. [REDACTED] and [REDACTED])

41. A child with a clinical diagnosis of Autism may not meet the eligibility criteria for special education. (Test. of Dr. [REDACTED] and [REDACTED])

42. [REDACTED] did not meet the eligibility criteria for having a disability under the category of Autism. (Test. of [REDACTED] [REDACTED] and [REDACTED] Stip. Ex. 66; Stip. 25).

43. Under the category of Other Health Impairment (OHI), the IEP team's determination that [REDACTED] did not demonstrate an impairment of limited alertness is supported by the evidence. The evaluations, observations, and reports by [REDACTED]'s teachers at [REDACTED] did not indicate limited alertness in the educational setting. (Stip. Exs. 70 & 80; Stip. 25; Test. of [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] The IEP team also determined that [REDACTED] did not have limited strength or limited vitality under the criteria for Other Health Impairment, but Petitioner presented no evidence regarding the IEP team's determination in those areas. (*Id.*)

44. In order to receive special education services, a disability must have an adverse effect on [REDACTED]'s educational performance. The evaluation of [REDACTED]'s educational performance is based on social, physical, emotional, and vocational performance, and not just letter grades. (Test. of [REDACTED] and [REDACTED])

45. The IEP team's determination that a disability did not adversely affect [REDACTED]'s educational performance is supported by the evidence. (Test. of [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] The IEP team analyzed [REDACTED]'s grades, classwork, and homework

in depth, as well as his social performance. (Test. of [REDACTED] and [REDACTED] The IEP team discussed the multiple interventions and suggestions provided to [REDACTED] to assist him with completion or submission of homework. (Test. of [REDACTED] and [REDACTED] The evidence showed [REDACTED] understood the material being taught, and he was able to follow the pace of the class. (Test. of [REDACTED] [REDACTED] and [REDACTED] [REDACTED] was easily redirected and able to focus in class. (*Id.*) [REDACTED] participated in class, asked and answered questions in class. (Test. of [REDACTED] and [REDACTED] The work [REDACTED] did in class was on par with his peers and was considered by his teachers to be on grade-level. (Test. of [REDACTED] and [REDACTED] Stip. Ex. 73).

46. While some of [REDACTED]'s grades were below average or failing, the evidence shows that those scores were based on [REDACTED]'s failure to complete and submit assignments. (Test. of [REDACTED] [REDACTED] and [REDACTED] Stip. Ex. 97).

47. Even if [REDACTED] had a disability that adversely affected his educational performance, [REDACTED] would not qualify for an IEP unless he required specially designed instruction due to his disability.

48. No credible expert testified that [REDACTED] required specially designed instruction.

49. Petitioner's expert witness, Dr. [REDACTED] is not credible. Dr. [REDACTED] spent no time with [REDACTED] directly or individually, and only observed him on two separate occasions in his math class at [REDACTED] for a combined total time of three hours. (Test. of Dr. [REDACTED] When faced with objective data from the teachers at [REDACTED] and teachers at [REDACTED] she chose to believe the teachers at [REDACTED] [REDACTED] completely discounting the teachers at [REDACTED] and what was offered to [REDACTED] (Test. of Dr. [REDACTED]

50. Petitioner's expert witness, Dr. [REDACTED] distinguished between things she disagreed with at [REDACTED] and would have done differently. (Test. of Dr. [REDACTED] Dr. [REDACTED] conducted an evaluation of [REDACTED] on September 11, 2017; her evaluation was not inconsistent with the IEP team's decision that [REDACTED] did not require specially designed instruction. (Test. of [REDACTED] Dr. [REDACTED] evaluation report merely recommended accommodations:

[REDACTED] academic skills are in the average range for age, which is commensurate with his overall estimated cognitive skills. He does not show deficits in phonological awareness or sequencing at this time, nor is his fluency significantly slow – he has made good progress in this area. His math fluency is still somewhat slow, and he may benefit from using a calculator on math assignments or tests. He would certainly benefit from additional time on any standardized tests due to his slower processing speed and his test anxiety. He will continue to benefit from support around organization and work completion, and finding strategies and routines that work for him and that he can begin to maintain independently will be important.

(Pet'r's Ex. 24 at page 6).

51. The IEP team's determination that [REDACTED] did not require specially designed instruction is supported by the weight of the evidence that [REDACTED] had the skills to access his education as he

demonstrated in class. (Stip. Exs. 66, 70 & 73; Test. of [REDACTED] and [REDACTED])

52. Based on all of the data collected and reviewed, [REDACTED] did not meet eligibility criteria for any of the disabling conditions, specifically Autism, Other Health Impairment, and Specified Learning Disability. (Stip. Exs. 66, 70 & 74; Test. of [REDACTED] and [REDACTED]) While the IEP team determined that [REDACTED] did not meet the eligibility criteria under Specific Learning Disability, Petitioner presented no evidence regarding Respondent's evaluation or eligibility determination in this category of eligibility.

53. Petitioner did not present any evidence that contradicts what [REDACTED]'s teachers observed of [REDACTED] at [REDACTED]. Petitioner's witnesses did not observe [REDACTED] at [REDACTED] and had no direct knowledge of how [REDACTED] functioned in that educational setting. (Test. of Dr. [REDACTED] and Dr. [REDACTED])

54. Petitioner has not met his burden of proof that Respondent failed to conduct a full and individualized evaluation between May 17, 2017 and May 17, 2018.

55. Petitioner has not met his burden of proof that he was eligible for special education services and was denied a FAPE on May 19, 2017.

### **Parent Participation**

56. [REDACTED] received notice of the IEP meeting scheduled for May 19, 2017 and initially agreed to attend. (Test. of [REDACTED] Pet'r's Ex. 23; Stip. Ex. 63). One day prior to the meeting, [REDACTED] sent [REDACTED] staff an email stating that she would not be attending the meeting. (Test. of [REDACTED]) Her email also contained correspondence between [REDACTED] and her attorney's office, questioning whether she could request IEEs [Independent Educational Evaluations] "without [] having to go to the meeting." (Test. of [REDACTED] Stip. Ex. 63). Respondent staff emailed [REDACTED] later that day asking for clarification regarding [REDACTED]'s email and whether she was requesting to reschedule the meeting, but received no response. (Test. of [REDACTED]) Respondent staff emailed [REDACTED] the morning of the IEP meeting, but also received no response from [REDACTED] (Test. of [REDACTED]) IEP team members called [REDACTED] the morning of the meeting, but got [REDACTED]'s voicemail. (Test. of [REDACTED])

57. Respondent took numerous steps to secure [REDACTED]'s attendance at the May 19, 2017, meeting.

58. Petitioner was not denied parent participation by [REDACTED]'s failure to attend the eligibility meeting.

59. Petitioner has not presented sufficient evidence that Respondent failed to ensure [REDACTED]'s attendance at the May 19, 2017, IEP meeting.

60. Petitioner [REDACTED] alleges that she was denied an opportunity to participate in the IEP meeting because she was not provided the evaluation reports prior to the IEP meeting. Approximately a week prior to the IEP meeting, [REDACTED] requested the evaluation reports, but was informed that the reports were not ready. (Test. of [REDACTED] Pet'r's Ex. 23).

61. Two days prior to the meeting, [REDACTED] was provided with the DEC 3, "Summary of Evaluation/Eligibility Worksheet" in the areas of disability being considered. (Test. of [REDACTED] and [REDACTED])

62. The DEC 3 worksheets provided a summary of all of the evaluations completed. (Test. of [REDACTED] and [REDACTED] Stip. Exs. 66 & 70).

63. It is asking a lot of parents to be presented with the evaluation results, process the information, and then start putting together a plan for their own child in the same meeting. Ms. [REDACTED] does not believe that IEP teams ever reconvene to allow the parents an opportunity to process the information that they have received in the meeting and then return with notes and questions. (Test. of [REDACTED])

64. According to Respondent's expert witness, it would not violate the ethical duties of school psychologists to provide psychological evaluation reports to parents in advance of IEP meetings if the psychologist was able to interpret the results at the meeting; school psychologists have an ethical responsibility to review the report with the parent. (Test. of [REDACTED])

65. At the May 19, 2017 meeting, the IEP team spent several hours reviewing and discussing all data. (Test. of [REDACTED] and [REDACTED])

66. The IEP team reviewed all of the data collected in order to determine [REDACTED]'s eligibility for special education as discussed in paragraphs 28 through 52, 61 and 62 above. (Test. of [REDACTED] and [REDACTED]) Although [REDACTED]'s parent chose not to attend the meeting, the IEP team members spent over five hours reviewing and analyzing the evaluation reports. (Test. of [REDACTED] and [REDACTED]) The team reviewed and considered [REDACTED]'s previous input and the private evaluations she had provided to the IEP team. (Test. of [REDACTED] and [REDACTED]) Two IEP Team members did not make up their mind about whether [REDACTED] was eligible until the end of the meeting, after all of the data was reviewed. (Test. of [REDACTED] and [REDACTED])

67. The Undersigned finds that if [REDACTED] had attended the IEP meeting on May 19, 2018, she would have had an opportunity to review and discuss the evaluation reports as a member of the IEP team during the IEP meeting.

68. Petitioner has not presented sufficient evidence that Respondent denied [REDACTED] his right to parent participation at the IEP meeting on the ground that Respondent denied Petitioner an opportunity to examine [REDACTED]'s records.

68. CMS sent IEP documents and evaluation reports via email to [REDACTED] on May 19, 2017. (Stip. 26).

69. CMS provided [REDACTED] with the written psychological evaluation report completed by Ms. [REDACTED] on June 20, 2017 via email. (Stip. 28).

70. Petitioner has not presented sufficient evidence that a decision was made about eligibility prior to the May 19, 2017 IEP meeting.

71. Petitioner failed to show that predetermination of [REDACTED]'s eligibility for special education services occurred prior to the IEP meeting on May 19, 2017.

### **Unilateral Placement in Private School**

72. On May 30, 2017, [REDACTED] unilaterally placed [REDACTED] at [REDACTED] [REDACTED] a private school outside of Respondent's district, for the 2017-2018 and 2018-2019 school years. (Test. of [REDACTED])

73. [REDACTED] enrolled [REDACTED] at [REDACTED] [REDACTED] and paid full tuition for the 2017-2018 school year on May 30, 2017. (Pet'r's Ex. 33; Test. of [REDACTED] and [REDACTED])

74. [REDACTED] notified Respondent of her intent to place [REDACTED] at [REDACTED] [REDACTED] at public expense on June 7, 2017. (Stip. Ex. 90).

75. [REDACTED] is not entitled to any compensation after January 2018 because he voluntarily repeated eleventh grade which delayed graduation. [REDACTED] had been promoted to twelfth grade at [REDACTED] in June 2017. (Test. of [REDACTED])

76. [REDACTED] was given the opportunity to take summer school at [REDACTED] in 2017 and could have earned credits to enable him to graduate from [REDACTED] in January 2018. (Test. of [REDACTED] [REDACTED] Stip. Ex. 37).

77. Petitioners voluntarily chose to have [REDACTED] repeat eleventh grade so that he could replace his grades from 11th grade at [REDACTED] with higher grades from 11th grade at [REDACTED] [REDACTED] for college applications. (Test. of [REDACTED] and [REDACTED])

78. [REDACTED] prepares student transcripts at [REDACTED] [REDACTED] (Test. Of [REDACTED])

79. At [REDACTED] [REDACTED] a student may take a course for grade recovery and then the original grade is removed from the transcript. The purpose of grade recovery is to improve the student's overall GPA for college guidance. (Test. of [REDACTED] and [REDACTED])

80. [REDACTED] completed a summer school geometry course at [REDACTED] [REDACTED] during the summer of 2017. (Stip. 29). The curriculum condensed the one-year Geometry course into an 11-day on-line course (Test. of [REDACTED] which did not have test or examination assessments. (Test. of [REDACTED])

81. The [REDACTED] [REDACTED] transcript does not show that [REDACTED] took a Geometry course at [REDACTED] during the 2016-2017 school year or that he received a grade of "D" for that course; the [REDACTED] transcript shows Geometry with a grade of "A" from [REDACTED] for 2017 Summer. (Pet'r's Ex. 70.)



82. Mr. [REDACTED] never graded any of Petitioner's work and based the summer course grade for Geometry on an email from [REDACTED]'s tutor, [REDACTED] in which she stated that [REDACTED] "mastered the content with an 85% course grade." (Test. Of [REDACTED] and Pet'r's Ex. 28).

83. Ms. [REDACTED] would have given [REDACTED] a final grade of "B" for the course. (Test. of [REDACTED])

84. The [REDACTED] transcript does not show that [REDACTED] took NC Math 3, Principles of Business & Finance, English III, American History I, Latin I, American History Founding Principles: Civics & Economics, and Earth/Environmental Science at [REDACTED] during the 2016-2017 school year or that he did not earn credits for NC Math 3, Latin I, and Principles of Business & Finance. (Stip. 17 & 27; Pet'r's.. Ex. 70.)

85. When [REDACTED] began at [REDACTED] there were approximately eighty-five (85) students in the entire school. (Test. of [REDACTED] and [REDACTED])

86. There are no special education teachers at [REDACTED] [REDACTED] (Test. Of [REDACTED])

87. The services or accommodations at [REDACTED] [REDACTED] described by Petitioner's Witnesses are not specially designed instruction.

88. The Undersigned finds [REDACTED] [REDACTED] is not an appropriate placement because it did not provide instruction specially designed to meet [REDACTED]'s unique needs. There was no testimony that [REDACTED] [REDACTED] was addressing [REDACTED]'s organizational skills, study skills, self-management skills or his alleged communication and social interaction impairments.

89. There is no evidence that [REDACTED] [REDACTED] is doing anything different for [REDACTED] than what [REDACTED] is doing all students who attend the school. (Test. of [REDACTED] Mr. [REDACTED] taught [REDACTED] in the 2018-2019 school year and testified that everything he did for [REDACTED] he does for every student in his class, and to his knowledge, all teachers at [REDACTED] [REDACTED] did similar things for their classes. (*Id.*) [REDACTED] [REDACTED] teachers use the top four learning styles in class which is not specific to [REDACTED]'s learning style. (*Id.*) Students can get one-on-one help from a teacher after school during academic support time. (*Id.*) At [REDACTED] [REDACTED] academic support is optional. (*Id.*) During academic support, students may get help on homework or work on homework. (*Id.*) This type of support is the same as what [REDACTED] offered through before- and after-school tutoring with teachers. (Test. of [REDACTED] and [REDACTED])

90. Because of its size, [REDACTED] [REDACTED] offers the kind of educational and environmental benefits that might be preferred by parents of any child, but individualized attention does not equate to specially designed instruction.

91. As a public school district, Respondent is not required to pay for a private placement that is not specifically designed for [REDACTED]'s individual needs.

92. [REDACTED] [REDACTED] is not the equivalent of an appropriate private placement simply because [REDACTED]'s grades are better; and, further, the grading scale at [REDACTED] [REDACTED] is extremely discretionary.

93. Petitioner has failed to meet his burden that [REDACTED] [REDACTED] is an appropriate placement that supports an award of tuition reimbursement.

94. Petitioner has not met his burden to show that an award of compensatory education is appropriate.

### **Witness Credibility**

95. The Undersigned finds the testimony of [REDACTED] [REDACTED] [REDACTED] Stacie Levi, [REDACTED] [REDACTED] and [REDACTED] to be more credible and more persuasive and, therefore, to carry the greater weight.

96. The Undersigned finds the testimony of [REDACTED] [REDACTED] and [REDACTED] to be less credible and, therefore, to carry lesser weight.

**BASED UPON** on the foregoing Findings of Fact, the Undersigned makes the following:

### **CONCLUSIONS OF LAW**

1. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

2. This Order incorporates and reaffirms the Conclusions of Law contained in the previous Orders entered in this litigation.

3. The Petitioners and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.

4. The Petitioners and Respondent named in this action are correctly designated and have received proper notice of this hearing.

5. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. The IDEA and implementing regulations and N.C. Gen. Stat. § 115C-109.6(a) control the issues to be reviewed.

6. In any action brought against a local board of education, the action "shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. § 115C-44(b).

7. Petitioner has the burden of proof to demonstrate that the IEPs offered by the school system were not in accordance with federal and state law. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

8. The trier of fact has sole judgment of the credibility of witnesses and the weight to be given to the testimony and whether it is consistent with other believable evidence that has been presented

in this case. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted). ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony.")

9. To be entitled to the “free appropriate public education” (FAPE) provided by the Individuals with Disabilities Education Act (IDEA), a child must be found to be a “child with a disability,” within the meaning of the IDEA, “who, by reason thereof, needs special education and related services.” 20 U.S.C. 1401(3)(A); 34 C.F.R. 300.8(a)(1); 34 CFR 300.300.

10. A student who is not entitled to a FAPE cannot show a denial of FAPE. An IDEA remedy cannot be granted to an ineligible student, on either substantive or procedural grounds, as both must rest on a determination that FAPE was denied. “[T]he fact that a child may have a qualifying disability does not necessarily make him ‘a child with a disability’ eligible for special education and related services.” *A.P. ex. rel Powers v. Woodstock Bd. of Educ.*, 572 F. Supp. 2d 221, 237 (D. Conn. 2008), *aff’d sub nom A.P. v. Woodstock Bd. of Educ.*, 370 F. App’x 202 (2d Cir. 2010).

11. Whether a student with a disability is afforded a “free appropriate public education” pursuant to an IEP is a two-fold inquiry: (1) whether the State has complied with the procedures set forth in the Individuals with Disabilities Education Act (“IDEA”), *Hendrick v. Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-7 (1982); and (2) whether the IEP developed through those procedures is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999, 1001 (2017). Thus, to prevail, a Petitioner must demonstrate by a preponderance of the evidence that the school district failed under both prongs of the test.

12. In matters alleging a procedural violation of the IDEA, the Court may rule that such a procedural violation results in a denial of FAPE in three circumstances: when the procedural deficiency (1) impeded the child’s right to FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE; or (3) caused a deprivation of educational benefit. NC 1504-1.14(a)(2).

13. The Fourth Circuit Court of Appeals has clarified that “to the extent that the procedural violations did not actually interfere with the provision of a free appropriate education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate education.” *Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997); *see also Singletary v. Dep’t. of Health and Human Servs.*, 502 F.App’x 340, 342, 2013 WL 29098 (4th Cir. 2013) (unpublished) (holding that “a procedural violation will not support a cognizable claim . . . unless the parent can show the procedural violation actually interfered with the child’s FAPE”).

14. Reviewing courts should be reluctant to second-guess the specialized knowledge and experience of educational professionals. *Board of Educ of Hendrick Hudson Central School Dist, Westchester County v. Rowley*, 458 U.S. 176, 206-08 (1982); *Endrew*, 137 S. Ct. at 1001. “[D]eference is based on the application of expertise and the exercise of judgment by school authorities. The [IDEA] vests these officials with responsibility for decisions of critical importance to the life of a disabled child.” *Id.* at 1001.

15. A court should not substitute its own notions of sound educational policy for that of local school officials. *Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1000-01 (4th Cir. 1997). Therefore, appropriate IEPs should not be disturbed due to a disagreement with the content or methodology, and courts should defer to the educators' decisions. *Rowley*, 458 U.S. at 207-08.

16. Before a child can be eligible for special education and related services under the IDEA, state or local education agencies must evaluate the child and determine that he is "disabled" within the meaning of the IDEA. 20 USC 1414(a)-(c). Eligibility under the IDEA requires more than a diagnosis or a finding of a disabling condition. *See, e.g., Fuaquier Cnty. Pub. Schs.*, 20 IDELR 579 (Va. SEA 1993).

17. A school district "must conduct a full and individual initial evaluation" before special education services are initially provided to a child. 20 USC 1414(a)(1); 34 CFR 300.301(a). A school district is required to assess a child in all areas of suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 20 USC 1414(b)(3)(B); 34 CFR 300.304(c)(4); NC 1503-2.5(c)(4).

18. A school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP. 20 USC 1414(b)(2)(A); 34 CFR 300.304(b).

19. As part of an initial evaluation, the IEP team must review all existing evaluation data, classroom observations, and information provided by the parent. 34 CFR 300.305; NC 1503-2.6(a). Based on that review and input from the child's parents, the district must identify what additional data, if any, are needed to determine the child's eligibility and educational needs. *Id.*

20. As long as the requirements of the IDEA are satisfied, the selection of particular testing or evaluation instruments is left to the discretion of state and local educational agencies. *Letter to Baumtrog*, 39 IDELR 159 (OSEP 2002); and *Letter to Anonymous*, 20 IDELR 542 (OSEP 1993).

21. A "functional behavioral assessment" ("FBA") is not a required screening or evaluation to determine eligibility under any category of disability in North Carolina. *See* NC 1503-2.5(d)(1)-(14).

22. A "functional behavioral assessment" ("FBA") is a data collection tool used to address a child whose behavior substantially interferes with his ability or the ability of others to learn in the educational environment. While the IEP team must consider the child's need for the use of positive behavioral interventions and supports under 34 CFR 300.324 (a)(2)(i), and an FBA may help the IEP team address behavioral issues, the IDEA does not require the IEP team to conduct an FBA in order to meet this requirement. 71 Fed. Reg. 46,683 (2006); *see also W.S. and K.M. v. Nyack Union Free Sch. Dist.*, 56 IDELR 210 (S.D.N.Y. 2011) (observing that the lack of an FBA does not render an IEP procedurally inadequate; the IDEA requires only that the IEP team consider behavior interventions and strategies).

23. The only time a “functional behavioral assessment” is mentioned in the law is in relation to school personnel’s authority to remove a child from their educational placement for disciplinary reasons. *See* NC 1504-2.1. In relation to such action, the child must receive a “functional behavioral assessment.” NC 1504-2.1(d)(1)(ii); 34 C.F.R. 300.530(d)(1)(ii).

24. Respondent conducted a full and individualized evaluation of [REDACTED] and, therefore, Respondent did not deny [REDACTED] a FAPE.

25. In North Carolina, in order to qualify as a "student with a disability": 1) the student must meet the definition of one or more of the fourteen categories of disabilities; 2) the disability must adversely affect educational performance; and 3) the student must require specially designed instruction as a result of his disability. NC 1503-2; *see* 34 CFR 300.8(a)(1) (emphasis added).

26. In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 CFR 300.8, and the educational needs of the child, each public agency must: (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered. 34 CFR 300.306(c)(1).

27. Under federal law, “autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” 34 CFR 300.8(c)(1)(i).

28. In North Carolina, in order to be determined eligible in the disability category of Autism (AU), “a child must demonstrate at least three of the four characteristics listed below: (A) Impairment in communication; (B) Impairment in social interaction; (C) Unusual response to sensory experiences; (D) Restricted, repetitive, or stereotypic patterns of behavior, interests, and/or activities.” NC 1503-2.5(d)(1). In addition, the “disability must: (A) Have an adverse effect on educational performance, and (B) Require specially designed instruction.” *Id.*

29. In North Carolina, in order to be determined eligible in the disability category of Other Health Impairment (OHI), first “a child must have a chronic or acute health problem resulting in one or more of the following: (A) Limited strength; (B) Limited vitality; (C) Limited alertness, including heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment.” NC 1503-2.5(d)(10). In addition, the “disability must: (A) Have an adverse effect on educational performance, and (B) Require specially designed instruction.” *Id.*

30. “Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability... .” NC 1500-2.32(a)(1).

31. Specially designed instruction means “adapting, as appropriate, to the needs of an eligible child under these Policies, the content, methodology, or delivery of instruction-- (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.” NC 1500-2.32(b)(3); *see* 34 CFR 300.39.

32. Respondent did not improperly deny [REDACTED] eligibility for special education services on May 19, 2017 and, therefore, Respondent did not deny [REDACTED] a FAPE.

33. An Individualized Education Plan (IEP) is provided only to students who are eligible for special education. An IEP is a written document that must include a statement of: (1) the child's present levels of academic achievement and functional performance; (2) measurable, annual goals; (3) how progress will be measured and reported; (4) special education and related services and supplementary aids and services; (5) an explanation of the extent, if any, to which the child will participate with nondisabled children in the regular class; (6) any individual appropriate accommodations for State and districtwide assessments; and (7) the projected start date, frequency location, and duration for services and modifications. NC 1503- 4.1(a)(1)-(7).

34. “[C]rafting an appropriate program of education requires a prospective judgment by school officials” and requires the “expertise of school officials” and “input of the child’s parents... .” *Endrew* at 999.

35. Because [REDACTED] was not eligible for special education services under the IDEA as a child with a disability, Respondent did not deny [REDACTED] a FAPE by failing to develop appropriate IEPs.

36. A parent’s right to participate in an IEP meeting for their child extends to the identification, evaluation, and educational placement of the student. NC 1504-1.2(b)(1)(i). The right also extends to meetings to decide on the provision of a free and appropriate public education. NC 1504-1.2(b)(1)(ii). The school district must take steps to ensure that a parent can participate including early notification and scheduling at agreeable times. NC 1503-4.3(a)(1)-(2). If a parent cannot physically attend, telephonic participation is permissible. NC 1503-4.3(c). This right is not unlimited when the parent resists attending the meeting. NC 1503-4.3(d).

37. If a parent refuses to attend an IEP meeting or takes actions that are equivalent to refusing to attend an IEP meeting, the school board may hold the meeting without the parent. 34 CFR 300.322(d); *see e.g., A.L. v. Jackson Cnty. Sch. Bd.*, 635 F. App’x 774, 780 (11th Cir. 2015) (unpublished) (although mother alleged she never explicitly refused to attend the IEP meeting, the court noted that “her actions were tantamount to refusal,” and it was appropriate for district to hold the meeting without the parent).

38. Respondent did not fail to ensure [REDACTED]’s attendance at the May 19, 2017 IEP meeting, and Respondent did not deny Petitioner his right to parent participation.

39. Under the law, no right exists for Petitioners to receive evaluation reports prior to an IEP meeting. There are two policies related to this issue in North Carolina’s *Policies Governing*

*Services for Children with Disabilities*: 1503-4.3(f) states that “[t]he LEA must give the parent(s) a copy of the child’s IEP at no cost to the parent(s) within a reasonable timeframe following the IEP meeting”; and 1503-2.7(a) states that “[u]pon completion of the administration of assessments and other evaluation measure--...(2) the LEA provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.”

41. There is no law, policy or professional ethic that prohibits the provision of a psychological report or any other evaluation report to a parent prior to an IEP meeting in which the appropriate professional will interpret the report’s contents.

42. Respondent did not deny [REDACTED] his right to parent participation when Respondent did not provide full evaluation reports to [REDACTED] prior to the IEP meeting.

43. The CMS practice, however, of not giving a psychological evaluation report to a parent prior to an IEP meeting and then giving a professional explanation of the psychological evaluation report without a parent’s prior reading of it and expecting a parent to digest both the oral explanation and a reading of the written psychological evaluation report while simultaneously participating in an IEP meeting composed of several general and special education professionals, and the LEA representative who are discussing the abilities and disabilities, behavior and conduct, emotional and psychological makeup, and educational needs of the parent’s disabled child as well as their perceptions of parental participation in their child’s education, is an expectation of herculean proportions.

44. A school system must not finalize its decisions before an IEP meeting is held. *Doyle v. Arlington Cnty. Sch. Bd.*, 806 F. Supp. 1252 (E.D. Va. 1992), *aff’d* 39 F.3d 1176 (4th Cir. 1994). Predetermination occurs when school district members of the IEP team unilaterally decide a student’s placement in advance of an IEP meeting. *See, e.g., Hanson v. Smith*, 212 F. Supp. 2d 474, 486 (D. Md. 2002) (“If the school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for meaningful input.”)

45. Respondent did not predetermine [REDACTED]’s eligibility for special education services before the IEP meeting was held on May 19, 2017.

46. A parent who unilaterally enrolls their child in private school without the consent of the public school district does so at their own financial risk, and a public school district is not required to fund private school education when the district has offered the student FAPE. *Burlington Sch. Comm. v. Mass. Dep’t of Educ.*, 471 U.S. 359, 373-74 (U.S. 1985). In addition to proving that there was a denial of FAPE under the IDEA, in order to receive tuition reimbursement for private school, a petitioner must also prove that the private school is appropriate. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7 (U.S. 1993). This remedy is not required or guaranteed; it is solely in the judge’s discretion based on the equities. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

47. A unilateral private placement is only appropriate if it provides “education instruction specifically designed to meet the unique needs of a disabled child.” *See Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 115 (2nd Cir. 2007). “[E]vidence of academic progress at a private school does not itself establish that a private placement offers adequate and appropriate education

under IDEA.” *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003). “[E]ven where there is evidence of success, courts should not disturb a state’s denial of IDEA reimbursement where the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not.” *Gagliardo*, 489 F.3d at 115.

48. [REDACTED] is not an appropriate placement that supports an award of tuition reimbursement.

49. The Fourth Circuit case cited by Respondent concerning Petitioner’s claim for an award of tuition reimbursement is not instructive where the decision of that case was based on the fact that the now adult child Plaintiff sought relief against the school district several years after the applicable statute of limitations had run. *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294 (4th Cir. 2005). There is no issue concerning the statute of limitations in the within matter.

50. While compensatory education is not a remedy expressly identified by the IDEA, it can be an appropriate exercise of the court’s authority to “grant such relief as the court determines appropriate.” 20 U.S.C. 1415 (i)(2)(c)(iii) and 34 CFR 300.516.

51. Under the IDEA, when a child reaches the age of majority, all rights accorded to the parent transfer to the child and notice of this transfer of rights must be provided to both parent and child. 20 U.S.C. § 1415(m); 34 CFR 300.50(a); NC 1504-1.21(a) and 1505-2.16(c).

52. When [REDACTED] attained the age of majority on his 18th birthday, March 24, 2018, all rights of [REDACTED] transferred to [REDACTED] including the right to compensatory education and notice of this transfer of rights.

53. No issue was raised and no evidence was proffered concerning whether Respondent gave notice of the transfer of rights to [REDACTED] upon attainment of majority and, therefore, no conclusion is made concerning whether notice was given.

54. Respondent did not deny [REDACTED] a FAPE and, therefore, an award of compensatory education is not appropriate.

**BASED UPON** the foregoing, the Undersigned makes the following:

### **DECISION**

It is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent denied [REDACTED] a free and appropriate public education between May 17, 2017, and May 17, 2018, by failing to conduct a full and individualized evaluation of [REDACTED]



2. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to provide Petitioners an opportunity to examine [REDACTED]'s records which denied Petitioner his right to parent participation.
3. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to ensure Petitioner's attendance at the May 19, 2017 IEP meeting which denied Petitioner his right to parent participation.
4. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent inappropriately denied [REDACTED] eligibility for special education services on May 19, 2017 and, therefore, Respondent did not deny [REDACTED] a FAPE.
5. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent predetermined [REDACTED]'s eligibility.
6. The Petitioner has failed to carry his burden of presenting sufficient evidence that Respondent failed to develop and offer an appropriate Individualized Education Plan ("IEP") between May 17, 2017 and May 17, 2018 and, therefore, Respondent did not deny [REDACTED] a FAPE.
7. The Petitioner has failed to carry his burden of presenting sufficient evidence that [REDACTED] School is an appropriate placement that supports an award of tuition reimbursement.
8. The Petitioner has failed to carry his burden of presenting sufficient evidence that an award of compensatory education is appropriate.
9. Respondent is the prevailing party on all issues.

**Therefore**, the relief requested in the within Petition for Contested Case (Special Education) hereby is **DENIED**.

### **NOTICE OF APPEAL RIGHTS**

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this dismissal.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review

Officer shall conduct an impartial review of the findings and decision appealed under this section.”

Inquiries regarding the State Board’s designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

**IT IS SO ORDERED.**

This the 23rd day of April, 2019.



Selina Malherbe  
Administrative Law Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 23rd day of April, 2019.



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